

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

JAMES DAVID O'BRIEN,

Defendant.

Case No.: 1:21-cv-09575 (DLC)

**AFFIDAVIT OF JAMES DAVID O'BRIEN**

I am the Defendant in this matter, and I respectfully submit this Affidavit consistent with the terms of Judge Cote's March 30, 2023 Order.

I, James David O'Brien, of full age, hereby provide the following as the equivalent of sworn testimony:

1. I agreed to settle the injunctive relief portion of the case and to neither admit nor deny the allegations against me for several reasons. Having been a market professional for over 20 years, I have seen many people agree to similar deals and realize it's almost standard in these seemingly never-ending cases. I reached out to one of them who agreed to a similar arrangement despite declaring he wanted to fight to the end and clear his name. I asked him if he was ever able to get over the feeling of admitting, or partially admitting defeat even when you know you have done nothing wrong. I realized after that conversation that fighting to the end would never "clear my name," even if it should, and that I would never get the last seven years of my life back. I would never be repaid for the legal fees I spent, I would never gain health back that failed in 2021 when I suffered a stroke (due to the stress of this case as I am not a smoker or overweight), and the lost revenue is incalculable. This proceeding has ruined my life, I won't get reinstated at the

brokerage firms where the SEC had a hand in getting me thrown-out even if I were successful. The SEC will never release a statement saying they were wrong, even if this matter went to trial and a jury agreed with me. The Appeal process would continue, and it would never end. The falsities in the Complaint will exist forever. The SEC seems to be making the leap that neither admitting nor denying means guilty and just runs with that assumption throughout their pleadings. For example, if the SEC, who's supposed to be the vanguard of this industry, looks at their Examples in SHOP & SLAB and thinks it supports their opinion, that proves to me how tough it must be to understand for someone not versed in trading.

2. I have also seen people's eyes glaze over as I explain the intricacies of this case to lay people. It all makes perfect sense to me and industry friends who understand trading. I was a professional working in the securities industry for more than 20 years. My job was to do what I am accused of doing improperly in this case. I was a market-maker.

3. I believe this case actually started after I sued my broker, Fidelity, through the FINRA arbitration process in 2014. Fidelity laid down on a trade in Crumbs Bakery, costing me \$5,870.75. I won. If I was "running a scheme," why would I involve FINRA? I knew I was in the right; however this probably started them taking notice of me, seemingly as "sour grapes." This is particularly true as I rejected an attempt to "split the loss" with the broker. Minutes after I turned them down they called back and awarded me the whole amount. After that arbitration I noticed a guy I had worked with at NITE, who now works at FINRA, repeatedly looking at my LinkedIn profile. I even emailed him asking if my complaint had landed on his desk, he never responded but seemingly was keeping tabs on me from then on.

4. I was a Market Maker for 20 years, and one of the best during the dotcom era, top five (5) out of about two hundred (200) traders at NITE I made over \$1M for the firm in a single

day several times. Other than a couple senior traders, there was almost no other person at NITE that can even say they did that even once. When I was tracking down the trade that was cancelled on me by the Market Maker Fidelity routed the order to in the FINRA case, the Trader who I talked to at VFIN (who I didn't know) knew me from my NITE days, 12-13 years earlier, from a kind of famous trade in Emulex where I made the firm \$2M in one day and the President of the firm said "J.D. saved the quarter." I was a well-known and respected trader, not a guy "running a scheme."

5. As a Market Maker your strength is trading minute to minute, catching small movements trying to pick spots to buy or sell, dozens of times a day. It's literally the same thing I was doing from home, but I understand that Market Makers don't want what is called "fast money," buying and selling stock all day, it makes it tough for them to make money, and not worth paying for that order flow. When I was at NITE we would often flag "fast accounts," and have them removed from the platform. So, when I had my account closed at Fidelity with no reason given despite me calling and asking several times, I assumed it was due to me being "fast money," (and the fact that I had sued them) though no concrete reason was ever given to me. E\*TRADE-with Citadel as their main Market Maker, closed my account after just 3 weeks, but not before they ganged up on me and drove a stock down causing me to lose \$105,000 in a single day.

6. The way I trade is really described well by Michael T. Dorsey, Esq., who helped me in this case when he said:

*O'Brien engaged in a strategy commonly used in the securities industry known as "price discovery". (ECF No. 57-4, Dorsey Expert Report 2; ECF No. 57-3, Dorsey Dep., 67:8-22, October 6, 2022). That practice gave O'Brien an improved understanding of where he could reasonably expect to receive executions for his buy market orders. Id. Moreover, O'Brien could not have possibly manipulated the market with regard to the two securities identified in Appendices A & B since the volumes on the days in question are much too large*

*to allow O'Brien to "push the market down" using sell limit orders that were so few in number and so small in size. (ECF No. 1; pp. 20-25; ECF No. 57-4, Dorsey Expert Report 2, ECF No. 57-3, Dorsey Dep., 116:14-117:12, October 6, 2022).*

7. Trading involves risk. If what I did was a "scheme," wouldn't I win every time? In their Complaint, the SEC cites a high win rate, though even their math is manipulated to make the win rate seem higher than it actually is. I could point out how they count a \$6 win and a \$250,000 loss equally to come up with their % of wins, but of course that is distorted. It seems their real complaint was that I was "winning," like a casino where they expect you to lose. It makes me think the SEC really got their marching orders from the Market Makers who pay the majority of the SEC's budget. Which sounds more like a "scheme," to you, a trader at home, in South Jersey, 100 miles from the Servers where the Market Makers and High Frequency Traders have their Black Boxes hooked up just inches away from the servers that control the market, (where the length of the cord used to hook up to the server is regulated so that no black box gains a one inch advantage over another) or those HFT and Market Makers who never lose? Ahead of Virtu's IPO, they reported one losing day over five years. This highlights a huge conflict of interest and the anti-competitive nature of it in this case. Who would the SEC side with, the guy trading like a market maker out of his home in South Jersey while he's changing diapers, or the firms that pay them hundreds of millions of dollars a year?

8. I know I shouldn't have to come up with an explanation for why the SEC has relentlessly pursued me for so long, but as a rational person there seems to be two possibilities. 1. The SEC was tasked by market makers to "take out the competition," destroy the guy stepping in between them being able to run roughshod over the market and ruining their profit margins in certain stocks. There used to be about 30 different Market Makers trading a big stock back when I started my career in the mid-90's, essentially no one knew what orders anyone else had and it

was a much fairer marketplace. Now two Market Makers control the majority of the order flow and basically hold all the cards and dictate what happens. Or, 2. The SEC attorney saw an opportunity to go after a case that sounded like another case they had and may have been an “area of focus,” and saw an opportunity to work on this case for 8 years. This might explain why there have been multiple subpoenas to the same closed brokerage accounts, as a way to seem busy on an active investigation, including at least a 6<sup>th</sup> subpoena to Wells Fargo this summer a few weeks *after* the Court said it was too late for new 3<sup>rd</sup> party subpoenas. I don’t know either to be true, but it would explain why this case has continued on despite there being nothing to what they have pursued, and why despite a 5-year legal fight being fought, there is ample reason to believe nothing is worthy of disgorgement. I believe the impetus for this case in addition to the “sour grapes” point made earlier relating to Fidelity, was this Taub case they had where 2 guys did “run a scheme,” and I checked some of the same boxes if you only glanced at it quickly.

9. My admittedly biased take on the discovery deposition, is that after 3 hours plus of testimony, Mr. Ellenbogen was able to get me to concede that despite them subpoenaing every broker I had multiple times for every email they sent me, I couldn’t be 100% sure they had received every single one. So, the remedy for this was somehow for me to turn over my computers and old and current cell phone in the hope that some mystery email that landed in my Spam folder 7 years earlier might be recovered. What this email could possibly be that would prove their case, I can’t possibly imagine, but nonetheless all items were turned over and nothing additional was discovered. The real reason was to continue this overzealous investigation, searching for nonexistent co-conspirators that would prove the case the SEC has desperately tried to turn this one into for so long. Overreach that has led them to subpoena not just my phone records, but my mother in law’s phone records, her relatives in Minnesota that I’ve never met, members of her

Church groups phone records, a friend of mine I worked with 20 years ago phone records, his wife's phone records, his sisters phone records, someone who shares their last name's phone records (who they don't know.) They didn't stop there, they also got the 2017 phone records for the front desk of a building I last lived in in 2008, records for a 2017 Comcast Triple Play phone number I doubt I ever used at an apartment I had in 2009, yet both those records were listed as "Contacts," in my phone, despite not calling them in over a decade (I found this when I dialed them during discovery to see whose number it was) so that just proves they had remotely accessed my cell phone already, long before I was ordered to turn it over. This is probably the real reason they pushed for the computer, and phones, so they could claim they would have obtained this "evidence," independent of a potential Constitutional violation, seemingly satisfying the "Independent Source Doctrine." Though, I don't know the law.

10. The SEC has repeatedly brought up a draft email (never sent to anyone) lifted from my email first shown to me in the interview the SEC had with me in early 2021, well before I gave them my email passwords and computers. A draft that has a link to an article about "spoofing", created just after I received a form letter email from a brokerage that listed "prohibited practices." One of these things was "Spoofing," since I didn't really know what it was I looked it up, put a link to an article in a Draft to read later, and there it sat. The SEC snoops thru my email, finds this and says, "A-ha!" even though we know he's not spoofing, we can bring this up to have that term in the conversation. They would try the same thing with the term "Layering". They found an email in which a broker sent me a letter warning me one of my trades *may* appear like Layering. I sent a lengthy response disputing that was the case, and that brokerage remained open for several more years until it was closed days after the Complaint was filed. That did not stop the SEC, they just checked off a box and it gave them a reason to continue this witch hunt.

11. I say, “witch hunt,” because that’s truly what this is, like the witch trials of old where if you floated you were a witch, if you sank like a stone you were innocent, there is essentially no way to prove my innocence by the “law” they have made up. They created a fake crime called “Coordinated Trading,” and based its very definition on how I trade. This holds true for “account closures,” that the SEC gleefully point to “as evidence” of wrongdoing. While I told you many accounts were shut down quickly, factors being a “new account,” living in a “high risk zip code,” and obviously being “fast money,” had to be another reason. (Brokers rely on payment for order flow, now that there are no commissions-and even before that, fast money order flow is not worth paying for and the Market Makers can shut an entire firm off if they deem their flow to be hostile). Once I made it past the 90-day new account threshold I ran into a new impediment at several brokerages: the SEC asking for information about me. Once I overcame being a “new customer, and the terribly “high risk zip code” I live in, now the SEC starts asking for information about me, and as I see was justified now, no brokerage wants this hassle in their life, answering multiple subpoenas and sending email and data files, only to be asked for the same information again in a few months and years later. It only makes sense that once the SEC inquiries about a customer, you cut ties with that customer, yet the SEC points to that account closure as “Further proof,” of wrongdoing...witch! “Subpoena that firm about O’Brien...oh they kicked him out...he must’ve been doing something wrong...wait, they didn’t kick him out? Well, subpoena them again! You know what, to teach them a lesson, subpoena them five or six more times!” This is what I have come to refer to as “Regulation by Harassment,” similar to the “Regulation by Enforcement,” the SEC has been accused of doing over the years. They made up their fake law I was supposedly breaking, “Coordinated Trading,” knew it didn’t exist, so never was able to approach a court for injunctive relief to stop me from trading, since there was no law they could

point to that was being broken. So instead to achieve the same goal, they bombarded brokers I used with subpoenas until they relent and dropped me as a customer and then the SEC acts as though they had no hand in the brokers closing my accounts.

12. There is no law against trading in multiple accounts and several people recommend having multiple accounts. At the proffer session I explained why I used other accounts, this case extends so long it goes back to when commissions were still a thing, and having an account where I could do Price Discovery Trades for much cheaper rates made logical sense. At the larger brokers they would bunch trades, you could do 1 share or 100,000 shares for the same \$9.99 or \$7.99 price, as I traded more I negotiated those rates down to less than \$5 but couldn't gain access to Dark Pools thru those brokers, I was told "Only our Market Makers have access to Dark Pools." As a Former Market Maker myself I knew how valuable that information was, actually I just saw an email from a broker advertising a webinar on How to Use Dark Pools from 2016 that said "Over 40% of all Trades occur in Dark Pools," Gary Gensler has said now that number is well over 50% with 90% -95% of trades not even going through lit exchanges. So, to find out the true nature of what's going on in the Market it's necessary to interact with these Dark Pools to see where true supply and demand lies. At smaller discount brokers I was able to do price discovery trades of 100 shares for 50 cents or less, which is considerably cheaper than the bunched rate.

13. The SEC then asked a valid question, "why not just use the discount broker for all your trading?" The problem is, those per/share rates were not cheaper when you bought 2,000 or 5,000 shares. The math is simple: if you're buying 100 shares for 50 cents, it costs you \$5 for 1,000 shares or \$25 to do 5,000 shares (or actually more as they tacked on an extra fee for orders over 1,000 shares, plus ECN fees.) I think I saw an email in their files complaining about a \$70 commission for an order at one of these per/share brokers, so it just made economic sense to use



one account for small trades, and another broker for larger trades, it was certainly more cumbersome, toggling back and forth between 2 screens and different platforms. Yet even after hearing that logical explanation, and even though it's not illegal to have 2 accounts, the SEC plodded forward, disregarding simple math, intent that the reason I was using 2 accounts was to deceive someone.

14. The SEC claims that I was so disruptive to the marketplace that they did *nothing* for five years, (longer when you consider how long they've been investigating me - 3 ½ years was the time from when I found out about the investigation to when the Complaint was filed) which brings me to another point, that no one was harmed by my trading (other than me after all of this). I can even show how triggered stop orders in SHOP and SLAB (their 2 examples) would have received better prices through my executions than where the Market Makers would have executed them if I hadn't stepped in. Brokers benefitted from the money I paid in commissions, plus payment for order flow money they received from the millions of shares I traded. The Government benefitted in the form of the taxes I paid from Day Trading, which are all realized as short-term gains. Even after hearing all this the SEC just acts willfully ignorant and comes back in their motion papers with absolute nonsense, saying I didn't need Dark Pool access since I "admitted I had Level 2 Access." They either don't know (which would be scary), or hope the reader doesn't know, that you can't see Dark Pool orders even with Level 2 or even Level 3 access, Dark pools are like an invisible force field around the bid or offer, it's not until you try to interact with that bid or offer that you find out that they are there. The SEC did other "arguing just to argue," to avoid talking about the facts when they said, "I couldn't prove that SHOP or SLAB was reacting to news events."

15. In the Complaint, the SEC accuses me of “Lying about his Trading Strategy,” They claim I lied about my Trading strategy where I said in an email to one broker that “I mostly trade on Upgrades, News events, Recommendations on CNBC from Jim Cramer or the Najarians or Josh Brown,” (Then listed 3-4 stocks I traded *that* day that were mentioned on CNBC). The SEC disregards what I said again, and has decided I’m a liar, and to show I’m a liar they mention 4 stocks in the Complaint, all of which had news events in them. Their expert, Dr. Orlov, goes on to mention a couple more, which also had news surrounding them. After ignoring this simple truth, the SEC comes back in motion papers with, “Well, he can’t prove the stocks were reacting to news.” So now we’re at a chicken or the egg argument? Or if a tree falls in the forest and no one’s around, is it because of J.D.’s trading? Basically, an unknowable answer “why did a stock do anything?” How do I “push a stock down by trading a few hundred shares? How do I “Push it up” by doing nothing, like in the SHOP example, I do nothing for 39 seconds as the stock rallies a dollar, then the SEC with a straight face, glosses over that and contends the stock moved because I sent five- one hundred share orders *after* it rallied a dollar and got filled on 3 of them.

16. The Commission has maintained that there is no evidence that the “news” about SLAB and SHOP was material such that it would have affected the stock price and trading volume “as O’Brien contends”. See news below:

**04/02/2019 09:32am SHOP Microsoft reportedly considering creating a Shopify competitor - The Information - Source [TradeTheNews.com](https://www.thetradejournal.com/news/microsoft-shopify-competitor)**



The prices shown here (\$20.605 - \$19.845) are 10/1 split adjusted, the stock in 2019 was \$206.04 at the close on April 1, on April 2 it opened at 9:30am at \$205.60, then traded up to \$206.05 in that same minute before news broke at 9:32am that Microsoft may be making a competitor to SHOP. In that same minute, SHOP stock plummeted from \$206 to \$198.45. Though the SEC claims there is no material evidence to prove this is why the stock dropped. If that's not proveable, then nothing is proveable about why ANY stock did anything, ever.

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| Role   | Order Time | Execution Time | Cancel Time | Buy/Sell | Order Type | Order Quantity | Execution Quantity | Share Balance | Order Price | Execution Price | Best Bid | Best Ask |
|--------|------------|----------------|-------------|----------|------------|----------------|--------------------|---------------|-------------|-----------------|----------|----------|
| Helper | 10:04:27   | 10:04:27       |             | Sell     | Limit      | 100            | 100                | (100)         | \$199.85    | \$199.85        | \$199.81 | \$199.91 |
| Helper | 10:04:24   | 10:04:28       | 10:04:56    | Sell     | Limit      | 100            | 3                  | (103)         | \$199.91    | \$199.91        | \$199.81 | \$199.91 |
| Helper | 10:04:30   | 10:04:30       |             | Sell     | Limit      | 100            | 100                | (203)         | \$199.73    | \$199.84        | \$199.82 | \$200.08 |
| Winner | 10:04:43   | 10:04:43       |             | Buy      | Market     | 3,800          | 3,800              | 3,800         |             | \$199.64        | \$199.35 | \$199.59 |
| Helper | 10:04:34   | 10:04:46       |             | Sell     | Limit      | 100            | 100                | (303)         | \$199.74    | \$199.59        | \$199.34 | \$199.59 |
| Helper | 10:04:56   | 10:04:56       |             | Sell     | Limit      | 100            | 100                | (403)         | \$199.53    | \$199.53        | \$199.50 | \$199.74 |
| Winner | 10:04:58   | 10:04:58       |             | Buy      | Market     | 1,900          | 1,900              | 5,700         |             | \$199.65        | \$199.47 | \$199.76 |

What's happening in this table above:

17. Using the above table, I either place an order at \$199.91 in the middle of the market and that becomes the offer, or I join the offer as an “alert” it’s actually the second order in the list. (Can’t be sure from the partial NBBO data which is only from when I place a trade) Then 3 seconds later I place a sell order in the middle of the market at \$199.85 testing for Dark Pool buyers, this order is executed immediately, then a second after that I get a partial fill at \$199.91 of 3 shares, but not the whole thing, so the buy interest may not be that strong, (like a fish nibbling at bait) so I try another 100 shares with an aggressive limit, this one is executed instantly in the middle as well, so I probably hop on my other screen and get ready to place a buy order (this takes a few seconds, it’s not just clicking a button) the extremely important thing is that after these 3 sell orders are sent, the NBBO is actually higher than it was when the first one was sent, \$199.82 x \$200.08 vs. \$199.81 x \$199.91. How has my selling “Pushed the Market Down,” when the NBBO is higher? We don’t see what else happens for the next 13 seconds, since only my trading activity is shown, so the reader can be tricked into thinking I am responsible for everything that happens in this stock. What I think happens is a large sell order appears on the offer which drives the stock down as I am sitting and watching, ready to buy 3,800 shares, the stock breaks thru \$199.50, down to \$199.35 x \$199.59, I’m thinking there are probably some stops triggered at \$199.50 and I send my market buy order, hoping to get filled around \$199.40. In my haste I built an order that was too large and gets treated as “Oversized,” which allows the Market Maker to fill me above the \$199.59 offer at \$199.64. (Earlier in a footnote the SEC claimed orders aren’t filled outside the NBBO). Since I didn’t get the fill I expected, it’s only logical to test for buyers again before buying more, 2 orders are sent, one looks like an alert on the offer at \$199.59 that is taken at 10:04:46, then no idea what happens for 10 seconds, probably creating my buy order, but when I test the market again at 10:04:56, I’m

filled in between immediately again at \$199.53 (higher than the \$199.50 bid) so that triggers me to buy more, 2 seconds later, filled at \$199.65.

|        |          |          |      |        |       |       |       |          |          |          |          |
|--------|----------|----------|------|--------|-------|-------|-------|----------|----------|----------|----------|
| Helper | 10:05:02 | 10:05:02 | Buy  | Limit  | 403   | 403   | 0     | \$200.01 | \$199.46 | \$199.22 | \$199.48 |
| Helper | 10:05:41 | 10:06:30 | Buy  | Limit  | 100   |       | 0     | \$200.12 |          |          |          |
| Winner | 10:05:45 | 10:05:45 | Sell | Market | 1,900 | 1,900 | 3,800 |          | \$200.23 | \$200.18 | \$200.32 |

18. Three seconds after my Buy at 10:04:58...I am wrong. The stock drops some more with the new NBBO \$199.22 x \$199.48 not sure what is happening, maybe someone late getting to work on those triggered \$199.50 stops, or another seller steps in, that's the beauty of the Market...you don't know! Again, we only see that the market is lower because I sent an order, covering the short in the "Helper/Price Discovery," account, buying 403 shares at \$199.46,(Profitably –despite the SEC claiming the Helper account "served no economic purpose"). So, we see the new NBBO is now \$199.22 x \$199.48 at 10:05:02, and then I do nothing for 39 seconds, yet the SEC claims I am to blame for "pushing the stock up." The stock has rallied about \$1 quickly, at 10:05:41 I send a buy order with a \$200.12 limit either testing for Dark Pool Sellers or as an Alert, but the Market has rallied past that limit since there is no Market Data available, but we see 4 seconds later the NBBO is \$200.18 x \$200.32 because now I am making a sale, without ever doing anything that could be considered "pushing the stock up," I also corrected my error of making the order not so big so as to be oversized and this time I get a nice fill in the middle, again indicating Dark Pool Buyers.

|        |          |          |      |        |       |       |       |          |          |          |          |
|--------|----------|----------|------|--------|-------|-------|-------|----------|----------|----------|----------|
| Helper | 10:05:57 | 10:05:58 | Buy  | Limit  | 100   | 100   | 100   | \$200.27 | \$200.27 | \$200.27 | \$200.35 |
| Winner | 10:06:00 | 10:06:00 | Sell | Market | 1,900 | 1,900 | 1,900 |          | \$200.24 | \$200.18 | \$200.33 |
| Helper | 10:06:12 | 10:06:12 | Buy  | Limit  | 100   | 100   | 200   | \$200.33 | \$200.33 | \$200.26 | \$200.39 |
| Helper | 10:06:17 | 10:06:20 | Buy  | Limit  | 100   | 100   | 300   | \$200.43 | \$200.43 | \$200.28 | \$200.50 |
| Helper | 10:06:25 | 10:06:31 | Buy  | Limit  | 100   |       | 300   | \$200.35 |          |          |          |
| Winner | 10:06:26 | 10:06:26 | Sell | Market | 1,900 | 1,900 | 0     |          | \$200.77 | \$200.60 | \$200.85 |
| Helper | 10:06:29 | 10:06:29 | Sell | Limit  | 300   | 300   | 0     | \$200.51 | \$200.79 | \$200.59 | \$200.85 |

19. To test for sellers, I send an order in the middle \$200.27 that when it isn't filled

in the Dark seems to create a new bid, but then is filled one second later, which sounds to me like a “Hidden Limit Seller,” (The order stays hidden until a bid pops up above its limit, then it hits it) so this makes me want to sell, hoping to sell to that same Dark Pool Buyer I just sold to 15 seconds earlier... Good News/ Bad News, the Buyer was still there and I once again sold in the Middle at \$200.24, the bad news is that Buyer has a real appetite and I kind of wish I hadn’t sold. Again we don’t see what else is happening in the Market for 12 seconds since it only matters when I do something, but the stock is higher after my sale, so I send a buy order that is filled in the middle at \$200.33. Now 5 seconds later I send another order with a \$200.43 limit, perhaps this is a “Dark Pool Only” order since the NBBO doesn’t change and I don’t get filled for 3 seconds, then 5 seconds after that I place an order that seems like an “Alert,” since it’s lower than my last fill and seemingly lower than the NBBO since there is once again no Best Bid or Best Ask information. (The “Alert” would let me know if the stock took a turn down when it got executed, so I could sell the last of my stock) As it seems, that was irrelevant since one second later the stock has popped to \$200.60 x \$200.85 (The SEC thinks my 100 share bid, 50 cents below the Offer is the cause, in a stock that traded millions of shares) I decide to sell the last of my stock, filled in the Middle again at \$200.77. I guess that Dark Pool Buyer was for real, and he must have been because the stock closed at \$201.50 that day. (Dark Pools tend to be used by Large Institutional Buyers). I then close out my “Helper/Price Discovery account,” also profitably at an even higher price \$200.79 (despite that account having “no economic purpose”).

20. This isn’t as confusing as it looks, it’s very simple and similar to SLAB but SHOP is shorter & easier to follow. SHOP is all of 15 Trades, where the SEC contends that 403 shares somehow drove a \$25 Billion Company down \$6.23 (Despite that move happening 32 minutes *before* my first trade) and 300 shares “pushed it up,” \$1.63 (Despite it rallying \$1.10



while I did nothing) all while somehow my orders are also “non-bona fide” despite 15 of 17 of the orders (88%) being executed.

21. If I did the thing they say is a law, but isn’t, in those two instances, I must have done the “not illegal” thing in all 18,000 or 19,000 instances (They change the number of instances based on whichever stat they want to amplify) and must give all the money back that I actually never made since they use some crazy standard that basically doesn’t count my losses or commissions paid, because when I lose on a trade, that’s not coordinated trading, when I win it is. The numbers they set forth starting with \$12.5M, reducing it to 6 million, reducing it further to 5 million, and not once looking at my tax returns which show the total gross profit earned from short-term capital gains is far less than any of their figures. It makes their whole evaluation flawed and cannot be relied upon to quantify disgorgement and not be taken as fact.

22. There’s another meritless argument they made in previous motion papers, claiming I couldn’t trade fast enough to interact with the HFT orders since my expert, Michael Dorsey, mentioned how HFT orders can appear and disappear in microseconds (not all orders do that, the larger Dark Pool orders are usually around until they are filled or their limit is exceeded). In that vein, it’s completely disingenuous how they only show my activity in relation to the trades, as if I was the only person trading in the market. The SHOP example shows that after I close out my short in the “Helper,” account I do nothing for 39 seconds as the stock rallies, yet by looking at the table, you see no other activity, so it falsely appears it’s all due to me. I can’t forget how they altered the email they used in the Complaint that shows I was trading at 9:30-9:35am in a stock, but they deleted the time shown, and then proceeded to argue with my expert that I didn’t trade

“near the open.” It’s the perfect example of the manipulation in which the Commission has engaged in an attempt to further their cause.

23. Just to show that the notion that brokers closed my accounts after SEC involvement, not because of my trading, Lightspeed received an SEC inquiry on January 2017 and my account was then closed in April 2017; FINRA sent a request to Citigroup in April 2020 and my account was closed in October 2020; Ally Invest Securities was harassed for two years after my account was closed, and the account was closed the same month that the SEC sent them an inquiry.; Score Priority (aka Just2Trade) sent me a letter three days after the Complaint was filed closing my account, despite the fact that I had not done an opening trade in that account for over 6 months. The Commission set forth in its current motion that brokerage firms closed my accounts conveniently omitting the timing.

24. In the event the Court is inclined to order disgorgement in an amount greater than that which was plead with specificity in the Complaint, I should not be ordered to disgorge more than 14.3% of the net profit I may have made from September 2015 through October 2020<sup>1</sup>, the timeframe set forth in the Complaint. The Commission’s expert report shows that my so-called “coordinated trading” events account for 64.3% of the overall dollar amount used to purchase securities. (ECF No. 76-2, p. 5; Orlov Dep. 46:9-19, September 30, 2022, Ex. “A”). If I wore a blindfold and picked stocks and trades on a random basis, I would have been correct half of the time without any price discovery so in essence, the accusation is that a 20+ year market maker veteran was able to “win” slightly more (6.4 out of 10, so 1.4 more) than what would happen randomly as a result of his “coordinated trading” methodology. The delta between the successful

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<sup>1</sup> The percentage should be slightly less since the Commission’s experts calculate the trading activity through May 2021; rather than ending in October 2020.



trades I would have made absent my technique, versus the enhanced percentage, the performance above a random trader should be the measurement used for the quantum of disgorgement; 14.3%.

25. In calculating the 14.3%, please look at my income tax returns for the years in question to compute the net profits earned from the “coordinated trading” activity, which can only be appropriately designated on my returns as “short term gains”. (Exhibit “G”). If all of the transactions happened within thirty (30) seconds as alleged, they certainly happened in less than a year and accordingly, can only be characterized as short-term capital gains under the Internal Revenue laws. 26 U.S.C. Section 1222. I engaged in significant short-term trading wherein positions were opened and closed within one year. My total short-term capital gains for the years in issue as reported on my federal income tax returns are as follows:

|      |                    |
|------|--------------------|
| 2015 | \$13,333           |
| 2016 | \$2,119,240        |
| 2017 | \$(298,171)        |
| 2018 | \$744,316          |
| 2019 | \$610,187          |
| 2020 | <u>\$1,286,966</u> |

TOTAL SHORT TERM CAPITAL GAIN: \$4,475,871

26. This is the total potential amount of profits earned during the five-year period in question, before any reductions for commissions paid and capital gains taxes of roughly thirty percent (30%) between the federal and state taxing authorities. Subtracting the short-term capital gain tax rate of 30%, which was already paid into the Treasury, the amount remaining is \$3,133,109.70. In addition, all trading in the Vanguard account did not and could not occur within thirty (30) seconds as Vanguard would not process trades in that time interval (the current trade time is 3 minutes). Accordingly, there is an appropriate total reduction of \$1,209,208.85 for those trades in 2019 and 2020. Further, using the same methodology that the Commission used to calculate the brokerage commissions and fees paid on their gross claim of \$10,427,669 in relation

to the actual gross profit earned of \$4,475,871, the commissions and broker's fees are equal to \$372,725.50. If one then subtracts the Vanguard trades, broker's fees and commissions paid of \$1,581,934.35, the new net profit amount is \$1,551,175.35 (\$3,133,109.70 less \$1,581,934.35). Then, applying a 50% rate for O'Brien under the theory that he would have been successful in trading at least half of the time without employing any methodology, a disgorgement amount of \$110,909.03 (\$1,551,175.35 divided by 2 and then multiplied by 14.3%) is the maximum that could be imposed, if any.

27. It is significant to note that on January 9, 2014, Citadel Securities LLC with charged with engaging in wash sales 502,243 times using its computer algorithms. A wash sale is where the buyer and the seller are the same entity and no change in beneficial ownership occurs. (Wash sales are illegal because they can manipulate stock prices up or down.) Citadel Securities paid a \$115,000 fine for these 502,243 violations and walked away. That's less than 23 cents per violation. There's another Citadel occurrence wherein they were fined by the SEC for incorrect reporting of 80M trades, at the rate of 4 cents per violation.

28. I can't stress how baseless their objection to my trading is, there is no law against the conduct they allege, trading using 2 accounts or selling then buying or buying then selling in any given time period, let alone making a determination that flipping sides of the market quickly is only improper when I do it over several seconds (or even 30) as Dr. Orlov defines it, but totally fine when computers do the same thing in milliseconds while sending billions of unexecuted orders (as much as 96%) never executed.

29. In sum, it has been my position from the outset that I engaged in no unlawful, fraudulent conduct whatsoever and the Commission has done nothing other than ruin my life for the past seven years. However, desirous of an end to this madness given my health and lack of

resources to continue litigation, I accepted the consent judgment. I am aware of all rules and regulations, except for the ones made up with no basis, and will never violate any law, rule or regulation. I had a spotless record until this witch hunt.

Executed on the 6 day of April 2023.

  
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JAMES DAVID O'BRIEN